Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES C. STALLINGS, - - - - **Petitioner**

versus

LLOYD FLETCHER and
STEVEN L. BESHEAR, - - - **Respondents**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Petitioner Was Deprived of the Unfettered Assistance of Counsel and Due Process of Law as Interpreted by This Court in *Brooks* v. *Tennessee* When the State Trial Court Ordered Petitioner to Either Testify Before His Last Witness, or Not at All?

II.

Whether Petitioner's Conviction Was Obtained in Violation of Due Process of Law When the State Trial Court Admitted Evidence Which Was the Fruit of a Warrantless Search Conducted in Violation of the Fourth Amendment to the United States Constitution, as Interpreted by This Court in *Mincey* v. *Arizona* and *Michigan* v. *Tyler*?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, James C. Stallings, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered on February 17, 1982, affirming the denial of habeas corpus relief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was rendered on February 17, 1982. No hearing was sought. [Appendix, hereinafter A., pp. 27-30].

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). The opinion of the United States Court of Appeals for the Sixth Circuit was rendered on February 17, 1982.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ..

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . ..

The Sixth Amendment to the United States Constitution, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ..

STATEMENT OF THE CASE

On October 14, 1975, Petitioner, then a detective with the Owensboro, Kentucky police, was indicted by the Daviess County Grand Jury for murder by "intentionally killing Catherine Stallings, Michael Stallings and Phillip Stallings during the commission of arson

in the first degree." [Transcript of Record, hereinafter T.R., p. 3]. Petitioner was first tried and convicted of the charged offenses in April, 1976. This conviction, however, was reversed on appeal. *Stallings* v. *Commonwealth,* Ky., 556 S. W. 2d 4 (1977). Petitioner was then tried a second time. This trial ended in a mistrial when the jury was unable to reach a verdict.

Petitioner's case went to trial for the third time in December, 1978. For this third trial, a change of venue was ordered to Jefferson County, Kentucky. [T.R., pp. 9-10].

Prior to this trial, Petitioner moved to suppress evidence seized at the scene of the fire. [T.R., pp. 82-83]. Petitioner alleged that the evidence in question was seized after the fire was extinguished, and without a warrant. [*Id.*]. Petitioner's motion for a hearing was denied. [Transcript of Pretrial Hearing, hereinafter P.H., pp. 15-30].

Douglas Richardson, a patrolman with the Owensboro Police Department, was the first officer to arrive at the scene. [T.E. II, p. 325]. Richardson saw fire coming from the second story of the Stallings home. [T.E. II, p. 326]. Richardson found Petitioner at the scene, who said to Richardson "they cut my tires and they cut my screen and now this." [*Id.*]. Petitioner also told Richardson that an intruder had shot at himself and his wife, and that Petitioner had rolled from the bed, grabbed his revolver from the nightstand, and returned fire. [T.E., II, p. 327].

Officer McGlothin of the Owensboro Police was the second officer to arrive at the scene. [T.E. II, p. 341]. Upon arriving, McGlothlin asked Petitioner what had happened to his wife, and Petitioner answered "the son-of-a-bitch shot her." [*Id.*].

Fred Wahl, Chief Deputy Coroner of Daviess County, testified that Mrs. Stallings had been shot five times. [T.E. III, p. 399]. Two of Petitioner's children died of smoke inhalation.

Jack Braden, a detective with the Owensboro Police Department, testified that he had formerly worked with Petitioner in doing investigative work. [T.E. III, p. 413]. Braden testified that Petitioner said he pursued the armed intruder and found that the stairway leading upstairs was on fire. [*Id.*]. Petitioner then woke his daughter Jamie, and carried his wife outside. [*Id.*]. Braden identified several photographs of the scene, including a photograph of closet doors containing bullet holes from Petitioner's shots. [T.E. III, p. 427]. Petitioner objected to the admission of this testimony on renewed search and seizure grounds. [T.E. III, p. 425]. Braden also testified that, based on the angle of entry and exit, the shots fired into the closet door could *not* have been fired from the position described by Petitioner. [T.E. III, p. 434]. Defense objection to this testimony was overruled. [*Id.*]. Braden testified that after questioning Petitioner, he returned to the scene to get his car. [T.E. III, p. 437]. A search of Petitioner's car disclosed an RG .38 pistol in the car's trunk. [T.E. III, p. 439]. Finally, Braden testified that two or three weeks before the fire, he was

called to the Stallings house to investigate a break-in. [T.E. III, p. 443]. Braden had found the window to the back door broken. [T.E. III, p. 445].

Charles Porter of the Owensboro Police testified that he also took part in the investigation of Petitioner's case. [T.E. III, p. 479]. Porter arrived at the scene at 4:45 A.M. [T.E. III, p. 480]. Petitioner objected to testimony concerning other weapons found at the scene. [T.E. III, p. 494]. Trial defense counsel again moved for an evidentiary hearing to determine the legality of the search previously challenged. [T.E. III, p. 495]. Petitioner's request for a hearing was again denied. T.E. III, p. 497]. Officer Porter then testified that a revolver, a .357 magnum, and a .25 automatic were found in the house. [T.E. III, p. 498]. Porter also identified a .38 Smith and Wesson found in the glove compartment of Petitioner's car. [T.E. III, p. 500].

The Commonwealth next introduced the previous trial testimony of Officer Fred Hall. [T.E. III, p. 523]. According to Hall, Petitioner had also told him that he owned three guns—a model 60, a .357 magnum, and a .25 automatic—but did not mention an RG .38. [T.E. III, p. 530]. Neither did Petitioner mention the gun found in his car's glove compartment. [*Id.*].

Hall testified that he had once picked Petitioner up at his home, that Petitioner was apparently angry at the time, and that in response to the question "What have you got—trouble at home?", Petitioner said "I am going to have to kill all those damn son-of-a-bitches someday." [T.E. IV, pp. 538-539].

Bob Norris, formerly an officer with the Owensboro Police, identified an arrest report dated October 5, 1969, showing that he, an Officer Long, and Petitioner had on that date arrested an individual for carrying a concealed deadly weapon. [T.E. IV, pp. 562-563]. The weapon was confiscated and later released to Norris and Officer Long. [T.E. IV, pp. 563-564]. Norris and Long flipped a coin for the gun and Norris won. [T.E. IV, p. 565]. According to Norris, he later sold the gun to Petitioner. [T.E. IV, p. 566]. Norris identified the RG .38 previously introduced by the Commonwealth as the gun he had sold to Petitioner. [T.E. IV, pp. 566-567].

Willard Weidemann of the Owensboro Police testified that he participated in a search of the Stallings house *after the fire was brought under control.* [T.E. IV, p. 597]. Weidemann observed bullet holes in the bedroom closet doors and had the doors removed. [T.E. IV, p. 598]. The doors were introduced into evidence. [T.E. IV, p. 600]. Weidemann also identified and introduced into evidence a Model 60 Smith and Wesson, containing five spent cartridges, which was found on the bedroom floor. [T.E. IV, pp. 601]. Weidemann also identified a .357 magnum [T.E. IV, pp. 614-615], its cartridges [T.E. IV, pp. 617-618], a .25 automatic [T.E. IV, pp. 619-620], and its shells. [*Id.*].

Oswald Maglinger, Assistant Chief of the Owensboro Fire Department, testified that the fire had already ventilated through the roof upon his arrival at the scene at 4:20 A.M. [T.E. IV, p. 665]. Maglinger stated that a fire started by natural causes would not

have reached this intensity so quickly. [T.E. IV, p. 669]. The two-by-fours showed a deep charring which Maglinger stated was suggestive of an accelerant. [T.E. IV, p. 673]. It was Maglinger's opinion that the fire originated at the foot of the stairs leading to the second floor. [T.E. IV, p. 674].

George Gordon, an Owensboro fireman, testified that he could smell gasoline on the second floor of the house. [T.E. V, p. 688]. Samples of wood, carpet, and ashes for testing were cut from the staircase with a power saw. [T.E. V, p. 690].

Walter Freeman, Chief of the Owensboro Fire Department, also testified that, in his opinion, the fire was started with an accelerant. [T.E. V, p. 701].

Clay Cessna, of the State Police Arson Division, testified that he removed samples from the base of the stairway, and from the first and second floors, and took them to the Crime Lab. [T.E. V, p. 721]. Cessna stated as his opinion that the fire was the result of arson. [T.E. V, p. 723].

Barry Marston, a chemist with the State Crime Lab, testified that he received the samples taken from Petitioner's home, Petitioner's bluejeans, and the various gasoline samples for testing. [T.E. V, p. 782]. Marston's testing revealed that the samples of wood, ashes, and carpet, taken from the Stallings staircase, as well as Petitioner's bluejeans, contained traces of "flammable petroleum hydrocarbon having the characteristics of gasoline." [T.E. V, pp. 785-788].

During a recess held at this point, trial defense counsel objected to the intention of the trial court to

compel Petitioner to present his case, until finished, without recessing for the evening. [T.E. V, pp. 814-817]. Petitioner's objection was overruled.

Next, David Williams, a firearms expert with the State Crime Lab, testified that he had received the five guns seized from Petitioner's home and car as well as the recovered spent shells. [T.E. V, pp. 820-821]. Trial defense counsel stipulated that the shells recovered from the body of Mrs. Stallings were fired from the RG .38. [*Id.*]. Williams testified that the shells recovered from the closet doors were fired by the Smith and Wesson Model 60. [T.E. V, p. 824]. Williams also testified that he had determined the angle of incidence of the bullets which had struck the closet doors and had concluded that the shots were fired into the doors at a downward angle, from a point five to six feet away and no lower than fifty-two inches from the floor. [T.E. V, pp. 827-829]. Williams also received and tested Mrs. Stallings' nightgown for firearm residue and found residues indicating that two of the shots had been fired from only one foot away. [T.E. V, pp. 834-835]. Williams further testified that the swab taken from Mrs. Stallings' right wrist tested positively for firearm residues, indicating a range of approximately two feet. [T.E. VI, p. 841].

David Orahood, a pathologist, found powder burns on Mrs. Stallings' arms, and was of the opinion that the victim could not have been shot from the foot of the bed. [T.E. VI, pp. 880; 885]. This concluded the Commonwealth's case.

At this point, the trial court recessed the jury until 5:00 p.m. with directions to come back "prepared for a long session." [T.E. VI, p. 907]. Defense objection was overruled. [T.E. VI, pp. 909-910]. The trial court agreed to permit the defense to present one witness on the following day — a chemist who was then unable to be present — but refused to permit Petitioner to take the stand on the following day after the chemist. [T.E. VI, p. 917].

Kenneth Stallings, Petitioner's brother, testified that Petitioner had told him on several occasions before the fire that he had received threatening phone calls and that Petitioner had even had his phone number changed. [T.E. VI, pp. 978-979]. Ken Stallings also related that someone had, previous to the incident, tried to break in his brother's door. [T.E. VI, p. 980].

Cleveland Stallings, Petitioner's father, testified that approximately a week before the incident Petitioner told him that Mrs. Stallings' keys had been stolen. [T.E. VI, p. 983]. Petitioner's father also corroborated the preceding testimony concerning threatening phone calls and the attempted break-ins.

John Rogers, an investigator for the defense, testified that the pattern of shots fired into Mrs. Stallings was reflective of the bucking of a gun for which an inexperienced gunman would fail to correct. [T.E. VII, pp. 998-1000].

Jamie Stallings, Petitioner's surviving daughter, testified that, on the morning of the fire she was

awakened by her father who told her to leave the house. [T.E. VII, p. 1006]. After they had exited the house, Jamie saw her father attempt to get inside, but he was driven out by the smoke. [T.E. VII, p. 1008]. Jamie had not smelled gasoline. [T.E. VII, p. 1010].

At this point, trial defense counsel announced to the court that all of the defense witnesses had testified, with the exception of Petitioner and the chemist who would be unavailable until the next day. [T.E. VII, p. 1013]. Petitioner's request that Petitioner be allowed to testify the next day after the chemist was again overruled. [*Id.*].

Petitioner then took the stand. Petitioner related that before the incident he had received a number of threatening phone calls; that two screens to the house had been cut; and, that someone had tried to break in on two occasions. [T.E. VII, p. 1014]. On the morning of the fire, Petitioner related that he was awakened by a man standing at the foot of his bed. [T.E. VII, p. 1016]. Petitioner rolled off the bed as shots were fired. [T.E. VII, p. 1017]. Petitioner picked up his gun from the floor, fired back, and pursued the intruder until he discovered the fire. [T.E. VII, p. 1018]. Petitioner testified that the bluejeans introduced by the commonwealth were not his. [T.E. VII, p. 1027]. Petitioner denied having threatened his family in the presence of Fred Hall, or having purchased two gallons of Amoco gas. [T.E. VII, p. 1030]. Petitioner also denied that he was the owner of the RG .38. [T.E. VII, p. 1032].

On the following day, Petitioner called his final witness, Peter Armendarez, a chemistry professor at Berea College. [T.E. VII, p. 1085]. Dr. Armendarez examined the test results and data of the Crime Lab with reference to the trace hydrocarbons found on the bluejeans, carpet, and other samples from Petitioner's home, and concluded that the hydrocarbons were *not* Amoco gasoline, as contended by the Commonwealth. [T.E. VII, pp. 1096-1097].

Following Dr. Armendarez's testimony the defense requested that it be allowed to recall Petitioner to the stand to ask some questions previously forgotten. [T.E. VII, p. 1119]. This request was denied. [*Id.*]. Petitioner's testimony was entered into the record as an avowal. [T.E. VII, pp. 1120-1122].

Contrary to Petitioner's plea, Petitioner was convicted of the intentional murder of his wife and the wanton murder of his children. [T.E. VIII, p. 1184]. Judgment sentencing Petitioner to two consecutive twenty year terms was entered accordingly on December 29, 1979. [T.R., pp. 280-281].

PROCEDURAL HISTORY

All issues raised herein were likewise raised at trial. On appeal to the Supreme Court of Kentucky, Petitioner's convictions were affirmed. [*Stallings* v. *Commonwealth*, 79-SC-306-MR (January 15, 1980) (Memorandum Opinion Per Curiam)].

As to Argument I herein, the Supreme Court of Kentucky held that the trial court did not err in requiring Petitioner to testify before his final witness,

notwithstanding the holding of this Court in *Brooks* v. *Tennessee,* 406 U. S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972).

Argument II raised herein was reviewed and disposed of in the following manner:

> "Appellant raises other allegations of error. Suffice it to say that we do not find these allegations to be meritorious and they will not be addressed."
>
> [*Stallings* v. *Commonwealth,* 79-SC-306-MR, p. 3].

After being denied federal habeas corpus relief in the United States District Court for the Western District of Kentucky, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit found that the trial court's order requiring petitioner to proceed with his own testimony before all of his witnesses had been called did not violate due process, where it appeared that the last witness which Petitioner's attorney had intended to call was not available until the following day. Accordingly, the Sixth Circuit found that Petitioner's reliance upon *Brooks* v. *Tennessee* was misplaced.

As to Petitioner's allegation that evidence was admitted against him in violation of the Fourth and Fourteenth Amendment, the Sixth Circuit found that both the police search and the arson search were justifiably initiated without a search warrant, pursuant to this Court's opinion in *Michigan* v. *Tyler.* Notwithstanding the wholly separate homicide scene investigation, the Sixth Circuit found that *Mincey* v. *Arizona* had no application to the facts of this case. It is important

to note that there was no evidentiary hearing, to which petitioner asserted he was entitled pursuant to *Townsend* v. *Sain,* 372 U. S. 293 (1963). While the Sixth Circuit found it would have been a "preferable procedure" to have held a hearing, the Sixth Circuit found no error in the determination of the state courts as to the conduct of the investigation. Nonetheless, the Sixth Circuit also accepted for purposes of decision, Petitioner's allegation that the critical evidence was in fact seized some six to twelve hours after the fire was extinguished.

ARGUMENTS

I.

Petitioner Was Convicted in Violation of His Guarantees to Due Process of Law and the Unfettered Assistance of Counsel Where the State Trial Court Compelled Petitioner to Either Testify Before His Last Witness, or Not at All.

During an in-chambers hearing held prior to the close of the Commonwealth's case, the trial court ruled that the presentation of Petitioner's case would begin immediately after the close of the Commonwealth's case and would be concluded that evening. The record reflects that the following exchange then took place between the court and trial defense counsel:

> Members of the jury you are now recessed until five o'clock. *When you come back at five o'clock, be prepared for a long session.* [*Id.*].

Trial defense counsel stated the basis for his objection to the ruling of the trial court as follows:

Your Honor, I think it is per se unfair to begin the case at this hour for the defense, in a much as it has been another long day. We have pursued the case for four days at the Commonwealth's direction. I know the Court feels that it may have been dragged out due to unnecessary cross examination by the defendant, however, we have discussed that before.

I think the heart of my argument is supported by the Supreme Court case—the U. S. Supreme Court case of Brook versus Tennessee which says that the defendant has a right to testify at any time during the course of his defense and that does not mean at the close of Commonwealth's case, it means before he rests his case and as reported to the Court that was anticipated to be tomorrow.

All along this has been scheduled as a five day case and tomorrow is Friday and the jury is tired and now here we are being requested to present our case to a jury which has had a full day at five o'clock when the prosecution had four days of arguing its case in front of a fresh jury and now here we are being requested, in fact, forced, to present our case and we are only permitted tomorrow to put on a chemist from Owensboro.

I would think that there is no compelling reason for the case to be finished today. There was no prosecution deadline announced. I don't believe that the Fourteenth Amendment, Due Proces and Due Protection clauses are going to be fully afforded my client and I think that he has a right to present his defense in a manner equitable with the Commonwealth's manner. [T.E. VI, pp. 910-912].

The trial court ruled that the defense could call one witness on the following morning, i.e., a chemist who was unable to be present earlier. [T.E. VI, p 915]. However, the trial court did not retreat from its ruling that the balance of Petitioner's case must be presented that evening. [T.E. VI, p. 917]. The trial court additionally denied a defense request that Petitioner be permitted to testify the following morning after the chemist. [*Id.*].

Petitioner, in accordance with the trial court's rulings, proceeded to examine his witnesses. When all the witnesses had testified with the exception of Petitioner and the absent chemist, trial defense counsel made the following motion:

> First of all, I have run out of witnesses. By this I mean, I have used the witnesses that are the defense's portion of the case with the exception of two. Let the record reflect that it is ten minutes to eight p.m. on this, the 14th day of December, and, Your Honor, in all due respect the defendant's testimony is quite lengthy and *I would like to have the jury consider his testimony as the last stage in this trial.*
>
> I know you have ruled, sir, I don't want to upset you or aggravate you but I would like for you to reconsider and let us go home and have the defendant testify tomorrow. [T.E. VII, p. 1013].

Petitioner's motion was again denied. [*Id.*] Petitioner then took the stand.

At the conclusion of Petitioner's testimony, trial defense counsel requested a mistrial based on the trial court's rulings:

> It is now nine-fifteen and I ask the Court for a mistrial based upon the Judge's failure to carry the case over until tomorrow morning as anticipated and that further I do not feel that I have competently represented my client in the manner to which he is entitled to under the law. Lastly, because I have now lost the effectiveness of the defendant testifying just prior to the jury receiving the case, that effectiveness has been lost and the defendant has been severely prejudiced and that is all I have. [T.E. VI, p. 1063].

Predictably, Petitioner's motion was denied. [*Id.*].

The right of an accused to a fair trial includes the right to a fair opportunity to defend against the state's accusations by calling witnesses and presenting evidence in his own behalf. *Chambers* v. *Mississippi,* 410 U. S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Petitioner submits that in the instant case he was deprived of a fair trial by the ruling of the trial court which forced him to choose between taking the stand prior to another witness, or not testifying at all.

In *Brooks* v. *Tennessee,* 406 U. S. 603, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972), this Court held unconstitutional a statute requiring a defendant to take the stand prior to other defense witnesses or forego his right to testify. Explaining the deprivation of due process worked by the statute, the Court stated:

> Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case. Furthermore the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyor might want to call him later in the trial. *The accused is thereby deprived of the "guiding hand of counsel" in the timing of this critical element of his defense.* While nothing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof, *the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand. Id.,* at 1895. (Emphasis added).

The ruling of the state trial court, like the statute challenged in *Brooks,* compelled Petitioner to testify prior to other witnesses, at an extremely disadvantageous time or not at all. The trial court's ruling thus deprived Petitioner of due process. Cf. *Nassif* v. *District of Columbia,* D.C., 201 A. 2d 519 (1964); *Bell* v. *State,* Miss., 5 So. 389 (1889).

Because the state trial court violated Petitioner's right to due process of law by requiring him to testify before his last witness, his conviction must be vacated. Accordingly, the Court should review the disposition of his case by the Sixth Circuit Court of Appeals.

II.

Petitioner's Convictions Were Obtained in Violation of Due Process of Law Where the Trial Court Admitted Evidence Seized Pursuant to a Warrantless Search of Petitioner's Residence.

Prior to Petitioner's trial, trial defense counsel moved to suppress all evidence seized in a warrantless search of Petitioner's home conducted by firemen and police officers *after* the fire had been extinguished. [T.R., pp. 82-83]. This evidence consisted of the following: 1) three guns and the cartridges in them removed from Petitioner's bedroom [T.E. IV, pp. 601-603, p. 606, p. 615, p. 618, pp. 619-620]; 2) closet doors from Petitioner's bedroom [T.E. IV, pp. 598-599]; 3) spent shells found inside the closet [T.E. IV, p. 633]; 4) numerous photographs of the bedroom [T.E. III, p. 427; T.E. IV, 622]; and 5) pieces of carpet and wood removed from the staircase of Petitioner's home with a power saw [T.E. V, p. 720]. All of the foregoing evidence was introduced at Petitioner's trial. Moreover, chemical analysis of the seized carpet and wood samples was introduced to show that the fire had been set with an accelerant. Also, testimony as to the angle of entry of bullets into the closet doors was used to discredit Petitioner's account of the incident.

During a pre-trial argument on Petitioner's motion to suppress, Petitioner alleged that the complained of search had taken place *after* the fire was extinguished and that the search had extended into "the defendant's dresser and in his closet" [P.H. p. 16]. Peti-

tioner alleged that the fire was completely extinguished by 7:30 a.m., but firemen had remained at the scene *"until late in the afternoon . . . for the purpose of securing evidence."* [P.H., p. 17]. Although Petitioner submitted that the fire was controlled by 7:30 a.m., and that the search had continued throughout the day and extended into such areas as dresser drawers, the trial court ruled that the search was justfied by "exigent circumstances" [P.H., p. 29]. The trial court also stated: "My finding is based on the representation that you made to me about the facts. *I'm not having an evidentiary hearing"* [P.H., p. 30; p. 21 (Emphasis added)].

During trial, Petitioner renewed his objection to the admission of the seized evidence. [T.E. III, p. 425, p. 494]. Petitioner also requested that an evidentiary hearing be held *"for the purpose of determining whether or not these persons had time to obtain a warrant, whether there were exigent circumstances to circumvent the necessity for a warrant . . ."* [T.E. III, p. 495]. Petitioner's request was denied. [T.E. III, p. 497].

Despite the lack of a hearing, certain facts surrounding the challenged search may be gleaned from the record. Charles Porter of the Owensboro Police testified that he and Detectives Braden and Nickens returned to the scene after questioning Petitioner at 7:45 a.m. [T.E. III, pp. 493-494]. According to Porter "[w]e went back to the scene of the house, different investigators and different detectives, and we started getting some help from the State Police

and checking out the house and *looking for weapons, anything that would help us in the investigation of this homicide.*" [T.E. III, p. 494]. Porter stated that the fire was "under control" by 6:45 a.m. [T.E. III, p. 481]. Firemen remained on the scene "all day . . . or three fourths of the day." [T.E. III, p. 506].

Detective Weidemann testified that "we had Detective Hall and State Detective Nickens and an alcohol and firearms and tobacco man by the name of Dave Carmin, he was there, and we searched the crime scene inside and out." [T.E. IV, p. 596]. According to Weidemann "[t]his was a thorough search." [*Id.*]. The police "went directly to the bedroom *where the shooting had occurred*". [T.E. IV, p. 597]. Wiedemann ordered the closet doors, *which contained bullet holes,* removed. [T.E. IV, p. 598]. Weidemann testi fied that Detective Nickens found the Model 60 under some fallen insulation. [T.E. IV, p. 601]. The .357 magnum was found inside the closet "in plain view *when the doors were opened*". [T.E. III, pp. 614-616 emphasis added)]. The .25 automatic was found in a dresser drawer. [T.E. IV, pp. 618-619]. Spent shells were found in the closet. [T.E. IV, p. 620]. Weideman was at the scene *"till almost dark that night"* and remained in the bedroom "[a]ll but an hour and a half." [T.E. IV, p. 624]. Weidemann had first entered the house at 6:00 a.m. [*Id.*]. According to Weidemann "[t]here were officers continuously in the bedroom." [T.E. IV, p. 625]. The search included "sifting through the insulation that fell" and forcing open a locked gun cabinet. [T.E. IV, pp. 626-627]. In

response to the question "Did you have any reason to believe that somebdy might remove from the scene the evidence of that crime?" Weidemann responded, "No, not while I was in charge of it." [T.E. IV, p. 625].

Clay Cessna, an officer with the Arson Division of the Kentucky State Police, supervised the removal of samples of carpet and wood from the staircase of the Stallings home. [T.E. V, p. 721]. The samples were taken for laboratory testing to ascertain whether an accelerate had been used. [T.E. V, pp. 722-723]. Cessna was in the house "from approximately six thirty in the morning until noon" and was "back in the house later that evening and back in the house on different occasions" for "further investigation." [T.E. V, p. 731]. According to Cessna, *the fire was extinguished by 6:30 a.m.* [T.E. V. p. 732].

From the foregoing it is obvious that Petitioner's home was subjected to an exhaustive warrantless search which continued for ten to twelve hours after the fire was controlled. *The search was primarily concerned with investigation of the apparent homicide* and had as its focal point the bedroom.

It is, of course, a fundamental principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions," *Vale* v. *Louisiana,* 399 U. S. 30, 90 S. Ct. 1969, 1971, 26 L. Ed. 2d 409 (1970). The burden of proof rests with the state in justifying a

warrantless search. *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 854 (1973).

In *Michigan* v. *Tyler,* 436 U. S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978), this Court was confronted with a case factually similar to the case at bar. This Court, dealing with a search conducted to determine the cause of a fire, found that the scene of a fire may present exigent circumstances necessitating immediate investigation "to preserve evidence from intentional or accidental destruction." [*Id.*, at 1950]. The Court stated its holding as follows:

> In summation, we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a *reasonable time to investigate the cause of the blaze.* Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. [cites omitted]. Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime. (Emphasis added).

The search conducted in the instant case is distinguishable from that in *Tyler* in that is was *not* a search intended merely to discover the cause of an unexplained blaze, but was instead *expressly* directed at gathering evidence of *homicide.* The search was *not*

confined to the point of origin of the fire and damaged areas, but ranged throughout the house, into closets and closed drawers. There was no showing by the Commonwealth that exigent circumstances demanded an immediate search of so extensive a nature. [The scope of a warrantless search is, of course, strictly circumscribed by the purpose which legitimates the search. *Terry* v. *Ohio,* 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1967); *Chimel* v. *California,* 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)]. Moreover, there was no showing by the Commonwealth that the ten to twelve hours during which officers remained in and searched the house was a "reasonable time" as required by *Tyler.* It cannot be assumed that whatever exigency existed, if any, continued throughout the day so as to preclude the brief delay needed to obtain a warrant.

Clearly, the mere fact that a fire has taken place at the scene of a crime does not, alone, justify an unlimited warrantless search. A more specific showing of exigency is required.

That a specific showing of exigent circumstances is required was clearly announced by this Court in *Mincey* v. *Arizona,* 437 U. S. 385, 98 S. Ct. 2408, 54 L. Ed. 2d 56 (1978). The Court in *Mincey* rejected the claim of the state that a murder scene presented a *per se* emergency requiring an immediate search:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth

> Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. Cf. Michigan v. Tyler, supra, —— U.S., at ——-——, 98 S. Ct., at 1950-1951.
>
> And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. Michigan v. Tyler, supra, —— U. S. ——, 98 S. Ct., at 2037-2038.
>
> But a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation," Terry v. Ohio, 392 U.S., at 25-26, 88 S. Ct., at 1882 . . .. [*Id.*, at 2413-2414].

The Court, dismissing the general allegation of the state that exigent circumstances had existed, observed:

> There was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. [*Id.*, at 2415-2416].

In the instant case, there is no dispute that the Commonwealth failed to show any particularized exigencies which would have justified a ten-to-twelve hour long search of petitioner's home. Nor are such circumstances indicated by the trial testimony; thus, the trial court's finding of exigent circumstances can

only be regarded as *unfounded.* Because evidence obtained in the unlawful, warrantless search was introduced at Petitioner's trial, petitioner's conviction must be vacated.

CONCLUSION

Petitioner's case presents significant issues concerning the constitutional restraints upon the power of a trial judge to control the order of proof in criminal cases, and the ability of the State to enlarge narrow exceptions to the constitutional requirement of a warrant incident to the search of a home. The decision of the Sixth Circuit is additionally in direct conflict with prior decisions of this Court. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Thomas Hectus, counsel for petitioner, hereby certify that the attached Petition for Writ of Certiorari and Notice of Appearance was served on Respondents by depositing three copies of the aforementioned documents in the United States mail, first-class postage prepaid, on April 7, 1980, addressed to respondent's counsel, Hon. Paul E. Reilender, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

C. Thomas Hectus
Member, Bar of the Supreme Court
of the United States
Counsel for Petitioner

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

81-5499

JAMES C. STALLINGS, - - - *Petitioner-Appellant*

v.

LLOYD FLETCHER and
STEVEN L. BESHEAR, - - *Respondents-Appellees*

ORDER—Filed February 17, 1982

Before: ENGEL and KENNEDY, Circuit Judges and DUNCAN, District Judge*

This habeas corpus appeal arises out of the conviction of petitioner James C. Stallings in the Jefferson County, Kentucky Circuit Court of one count of murder in the shooting death of his wife and one count charging murder of three of his children during the commission of arson of his home. From the denial of his petition by the district court, Stallings raises nine separate issues.

The most serious claim of error reduces to a claim that Stallings was denied an evidentiary hearing to which he is entitled under *Townsend* v. *Sain*, 372 U.S. 293 (1963), in order to determine whether the search of his fire-ravaged home, which occurred after the fire had been extinguished and without a search warrant, violated petitioner's Fourth and Fourteenth Amendment rights.

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*Hon. Robert M. Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

Stallings had been twice tried before the trial and conviction which is the subject of his petition. The first trial ended in a conviction which was reversed by the Kentucky Supreme Court. The second trial resulted in a hung jury. Prior to the commencement of the third trial, Stallings sought and was refused a pretrial evidentiary hearing on his motion for suppression of the evidence which was discovered and seized from his home. After a colloquy in which the prosecution and defense counsel argued in a general way what they expected the proofs to show, the state trial judge opined that, based upon the undisputed facts as represented to him by counsel, it appeared as a matter of law that exigent circumstances justified the warrantless search and seizure. At the same time, the trial judge ruled that if new evidence should develop before the trial, he would reconsider his ruling. No evidentiary hearing, however, was ever held although the suppression motion was renewed at trial just before the government presented the challenged evidence.

In upholding the search both the state trial judge and the habeas judge found the warrantless search to be justified by the exigencies facing the police and the arson investigators, but in so finding appeared to have concluded that the search had ended by noon of the morning in which the fire was extinguished. Notwithstanding this, it appears to have been asserted by petitioner that at least some items were seized after the noon hour. It also appears, however, that fire fighting officials and investigators had remained on the scene of the fire continuously from the time they first arrived on the scene to extinguish it until well later into the afternoon and after the investigation had been completed. It does not appear to have been claimed, nor does any evidence brought to the attention of the court indicate, that any evidence offered at the trial was obtained later than this time.

In the opinion of the court it would have been a preferable procedure for an evidentiary hearing to have been held, especially since, the search being warrantless, the burden was upon the government to prove the exigency which was claimed to obviate a search warrant. It also would have been appropriate for the respondent to have provided the habeas corpus court and this court with any information which might exist concerning whether during or preceding the other two trials, similar suppression motions had been made and ruled upon; we are obliged to observe that greater diligence in this respect might have resolved the issue and made the task here considerably less difficult. Nonetheless it does appear that upon its review of the same issue, the Kentucky Supreme Court, in upholding the search, found that "[t]he investigation conducted was not extended for an unreasonable period of time." It is the opinion of the court that this determination, even though made without the benefit of an evidentiary hearing, was not in error. There is no suggestion, after this case was tried on the merits on three separate occasions, that any item of critical evidence was seized from the premises after the first day. In the absence of an evidentiary hearing, we feel obliged to accept for purposes of our decision petitioner's allegation that the critical evidence was seized sometime in the afternoon of the day of the fire, some six to twelve hours after the fire was extinguished.

The court is of the opinion that the search which continued following the extinguishing of the fire but for the limited time involved here did not violate the guidelines set down by the Supreme Court in *Michigan* v. *Tyler*, 436 U. S. 499 (1978) and *Mincey* v. *Arizona*, 437 U. S. 385 (1978). It is true that the police investigation of the bedroom where Stallings' wife was shot was primarily concerned with the shooting and not the fire, but considering Stallings' statements to police and under the circumstances,

both the police and the arson investigators had every reason to suspect that the gunman who murdered Mrs. Stallings was also the arsonist (and killer of the three Stallings children). To find the gunman was to find the arsonist. In this respect the arson investigation, which focused on the stairs and upstairs area of the house, and the police search of the downstairs bedroom shooting scene were closely interrelated. Although conducted by police and not arson investigators, the search of the bedroom was an integral part of the arson investigation. We therefore hold that both the police search and the arson squad search were justifiably initiated without a search warrant, and did not extend for an unreasonable time, under *Michigan* v. *Tyler, supra. Mincey* v. *Arizona, supra,* has no application to the facts of this murder-arson case.

The court is of the opinion that none of the other issues raised on appeal has merit. Petitioner's reliance upon *Brooks* v. *Tennessee,* 406 U. S. 605 (1972), is misplaced insofar as that decision is claimed to have made unconstitutional the trial court's order requiring the defendant to proceed with his own testimony before all of his witnesses had been called, where it appeared that the last witness which petitioner's attorney had intended to call was not available until the following day. Likewise, we find no deprivation of due process to have occurred when the state trial judge disallowed further defense voir dire of prospective jurors concerning their understanding of reasonable doubt nor concerning their ability to objectively evaluate the defense to be raised. The state trial court's instruction on the presumption of innocence, burden of proof, and essential elements of the offenses were at least minimally sufficient under constitutional standards which guide and control federal appellate review in habeas cases. Likewise, there was no error of constitutional proportions in the claim that the state trial court improperly instructed

the jury on wanton murder when appellant had been indicted for intentional murder.

Finally, the court finds no merit in the claim that the revision in Kentucky's criminal procedures between the dates of offense and trial, which reduced from 15 to 5 the number of peremptory challenges available to a defendant, amounted to an Ex Post Facto law violative of Article I, Section 10 of the Constitution and the Fourteenth Amendment. The change was procedural only and did not affect the substance or elements of the crime of which petitioner was charged and convicted. In all events, there was no showing of any prejudice in theory or in fact. Accordingly,

It Is Ordered that the judgment of the district court is affirmed.

Entered by Order of the Court

(s) John P. Hehman
Clerk

RENDERED: JANUARY 15, 1980

SUPREME COURT OF KENTUCKY

79 SC 306 MR

James C. Stallings - - - - - *Appellant*

v.

Commonwealth of Kentucky - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Charles M. Leibson, Judge
No. 78 CR 1095

MEMORANDUM OPINION PER CURIAM AFFIRMING

James C. Stallings was convicted of the intentional murder of his wife and wanton murder of three of his children. He was first tried and convicted on October 14, 1975. This conviction was reversed on appeal. *Stallings* v. *Commonwealth,* Ky., 556 S. W. 2d 4 (1977). A second trial resulted in a hung jury. Stallings went to trial for the third time in December, 1978, and was again convicted of the charged offenses. From this conviction he was sentenced to forty (40) years' imprisonment. He now appeals from this conviction. We affirm.

Briefly stated, the facts adduced at trial indicated that a fire was discovered at appellant's home on the morning of August 12, 1975. It was determined by investigators that the fire was deliberately set. Appellant testified that he awakened on the morning of the fire and saw a man standing at the foot of his bed. Appellant further testified

that he fell to the floor to get his gun and the intruder shot appellant's wife several times. Appellant gave chase to the intruder and discovered the fire. He managed to arouse one of his daughters; he then picked up his wife and fled the burning home. He was unable to re-enter the house to save his other three children who perished in the fire.

Appellant presents several issues for review by this court. He alleges that the trial court erred in admitting evidence which was the fruit of an unlawful search. It is appellant's contention that evidence seized, during a warrantless search of the burnt house, should not have been admitted into evidence. We do not agree. The firemen and police officers had a right to search the premises in order to determine the cause of the fire and four homicides. The investigation conducted was not extended for an unreasonable period of time.

Appelant contends that it was error to compel him to present his case during an evening court session. Appellant does not state nor does he demonstrate that his counsel, the witnesses, or the jury became tired and inattentive . It is not error to conduct evening court sessions in this Commonwealth. *Anderson* v. *Commonwealth*, Ky., 353 S. W. 2d 381 (1961). We believe that appellant wrongly relies upon *Brooks* v. *Tennessee*, 406 U. S. 605 (1972), to support his contention that the trial court erred when he was compelled to testify before his final witness. To accommodate appellant the trial court allowed his last witness to testify on the last day of the trial. Appellant took the stand on the evening before the last witness testified. The trial court was not under obligation to allow appellant to delay the trial by testifying after his final witness.

Appellant also contends that he was substantially prejudiced when the trial court did not impanel the jury in accordance with KRS 29A.060(3) and RCr 9.30. The method used to select the jury was not in strict compliance

with the statute. When the method to be used was explained, defense counsel stated "I think I will object to that." The record shows that he made this statement because he thought that the would not be able to question the jurors individually. When it was explained to him that individual jurors could be questioned counsel did not raise another objection. Although we do not approve of deviation from the jury selection statutes, appellant did not properly preserve this issue for review and we do not find this procedural defect to be grounds for a reversal.

Appellant raises other allegations of error. Suffice it to say that we do not find these allegations to be meritorious and they will not be addressed.

The judgment is affirmed.

All concur, except Stephens, J., who did not sit.

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 81-0202-L(B)

James C. Stallings - - - - - *Petitioner*

v.

Lloyd Fletcher, et al. - - - - - *Respondents*

ORDER—Entered June 24, 1981

For the reasons set forth in the Memorandum filed this date,

It Is Ordered that the petition of James C. Stallings for a writ of habeas corpus be and it is hereby denied and this action is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable Order.

This 24th day of June, 1981.

Copies to:
Counsel of record

(s) Thomas A. Ballantine, Jr.
United States District Judge

MEMORANDUM—Entered June 24, 1981

This petition for a writ of habeas corpus it before the Court on the motion of the respondents to dismiss. A brief discussion of the factual background is indicated.

Petitioner, an Owensboro, Kentucky, detective, was indicated by the Daviess County Grand Jury which charged him with one count of murder in the shooting death of his wife and one count charging the murder of three of his children during the commission of arson of his dwelling. He was convicted on both counts of the indictment but his conviction was reversed, *Stallings* v. *Commonwealth,* Ky., 556 S. W. 2d 4 (1977), and a second trial ended in a mistrial when the jury deadlocked.

After a change of venue to Jefferson County, petitioner was tried and convicted in Jefferson Circuit Court on both counts. He was sentenced to consecutive terms of 20 years on each count. His conviction was affirmed by the Supreme Court of Kentucky in an unpublished per curiam memorandum opinion, *Stallings* v. *Commonwealth,* Ky., 592 S. W. 2d 465 (1980). Certiorari was denied by the Supreme Court of the United States, *Stallings* v. *Kentucky,* ____ U. S. ____, 101 S. Ct. 129 (1980).

Petitioner has advanced a litany of errors which he contends are of constitutional magnitude. We will treat them separately.

I.

Petitioner first argues that the refusal of the trial court to permit him to testify after calling his last witness, a chemist, was constitutional error, citing *Brooks* v. *Tennessee,* 406 U. S. 603, 92 S. Ct. 1891 (1972). This reliance is misplaced. *Brooks* struck down a state statute that required a criminal defendant to testify first in his own de-

fense or surrender his right later to testify. We do not have that situation. Petitioner's witness was unavailable at the time petitioner's counsel wanted to introduce his testimony. The trial court, in the exercise of his discretion and in an effort to bring the lengthy trial to a conclusion, refused to adjourn the trial until the next day when the witness would be (and was) available to testify. If this action were error — and we do not hold that it was — it was a state procedural error not cognizable in a federal habeas corpus proceeding. *Combs* v. *State of Tennessee*, 530 F. 2d 695 (6th Cir. 1976).

Petitioner's first argument is without merit.

II.

Petitioner next argues that the trial court's denial of his motion to suppress evidence seized without a warrant at the scene of the fire was a violation of his Fourth Amendment protection against unreasonable search and seizure.

It appears that while firefighters were still battling the fire at petitioner's home, police were investigating both the shooting of petitioner's wife and burning of his home. They entered the home and seized three guns from petitioner's bedroom, closet doors with bullet holes in them, spent bullets found in the closet after the doors were removed, photographs of the bedroom and carpeting and wood removed from the staircase where it was believed the fire had originated.

Petitioner contends that the warrantless search dictates that the evidence seized should have been suppressed. We disagree.

The record discloses that fire fighters were present at the time the items were seized. We further note that the police were investigating the homicide of petitioner's wife

which they were told by petitioner had been caused by an intruder.

We believe that the situation before the Court represents a combination of *Michigan* v. *Tyler*, 436 U. S. 499, 98 S. Ct. 1942 (1978), and *Mincey* v. *Arizona*, 437 U. S. 385, 98 S. Ct. 2408 (1978).

In *Tyler* the Court faced a situation in which entry to fight a fire was accompanied by a warrantless search to determine the cause of the fire. Certain evidence was seized. The Supreme Court rejected the argument that the fact that the investigators left the scene at 4:00 a.m. when because of darkness, smoke, and steam, they could not adequately investigate, mandated that reentry after daylight be pursuant to a search warrant. The Court wrote:

> "Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence." 436 U. S. at 511, 98 S. Ct. at 1951.[1]

In *Mincey* police conducted an extensive warrantless search of defendant's apartment over a 4-day period after a police undercover officer had been shot and killed. Holding that the exigency of a warrantless search abated when the emergency threatening life and limb terminated, the Court nevertheless recognized that under strictly circumscribed conditions a warrantless search may be conducted:

> "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amend-

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[1]The Court went on to hold, however, that a search warrant would be required for later entries after the initial exigency had ended.

ment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. (Citation omitted.) 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency,' *Wayne* v. *United States*, 115 U. S. App. D. C. 234, 241, 318 F. 2d 205, 212 (opinion of Burger, J.). And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." 437 U. S. at 392, 98 S. Ct. at 2413.

In the case before this Court the authorities were confronted with a fire and a homicide. They had been told by petitioner that an intruder had shot his wife. We conclude that the warrantless search, which was ended by noon, was clearly justified by the exigencies facing the police and the arson investigators.

We reject petitioner's second argument.

III.

Petitioner next advances the argument that due process was violated when the trial court limited his counsel's voir dire examintion of the veniremen. He complains that the trial court's refusal to allow questioning of the members of the panel concerning their understanding of the concept of reasonable doubt was constitutional error.

Ky.R.Cr.P. 9.38 provides:

"The court may permit the attorney for the commonwealth and the defendant or his attorney to con-

> duct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the attorney for the commonwealth and the defendant or his attorney to supplement the examination by such further inquiry as it deems proper. The court may itself submit to the prospective jurors such additional question submitted by the parties or their attorneys as it deems proper."

We believe that the quoted rule vests the trial court with wide discretion in controlling voir dire examination and in the absence of a showing of abuse of that discretion the trial court's determination will not be disturbed. It is only when the limitation imposed threatens to undermine the purpose of voir dire that abuse of discretion will be found. *United States* v. *Anderson,* 562 F. 2d 394 (6th Cir. 1977). We believe that refusing to permit questioning concerning a prospective jurors' understanding of reasonable doubt falls far short of undermining the purpose of voir dire.

The Seventh Circuit has recently manifested a trend away from any definition of reasonable doubt in jury instructions. We agree with the language in *United States* v. *Lawson,* 507 F. 2d 433 (7th Cir. 1974):

> "We are here dealing with ordinary English words of common acceptance. 'I doubt that' is a common expression. It is ordinary practice in negligence cases to instruct on the standard of care of a reasonable man. It would not seem to serve much purpose to resort to the antonym and define reasonable doubt as being doubt that was not unreasonable under the evidence. The phrase is not esoteric, such as *res ipsa loquitur,* nor is it confusing similar to other more common words such as 'proximate' or some of those employed in patent law.

> Because of the very commonness of the words, the straining for making the clear more clear has the trap of producing complexity and consequent confusion. That this difficulty may be surmounted is evidenced by the attempts which have been approved, although the language of approval has frequently implicitly suggested the difficulties of articulation. That the difficulties may be surmounted, however, does not mean in our opinion that the effort has to be made." 507 F. 2d at 442.

We conclude that the refusal of the trial court to permit the proposed voir dire did not amount to a denial of due process.

IV.

Petitioner's fourth argument also attacks the action of the trial court in denying his request to interrogate the prospective jurors about their beliefs concerning his defense that he was "framed." As we have pointed out above, limitations on voir dire lie within the sound discretion of the trial court and absent an abuse of that discretion those limitations will not be disturbed. *United States* v. *Anderson, supra.* We determine that the analogy between voir dire examination concerning an insanity defense and the defense asserted by petitioner is inapposite. *United States* v. *Allsup,* 566 F. 2d 68 (9th Cir. 1977), relied on by petitioner dealt with jury attitudes toward a subjective standard — that of mental capacity. The proposed questions which were rejected by the trial court in this case dealt with factual issues, and we cannot conclude that their exclusion was an abuse of discretion.

V.

Petitioner next takes aim at the trial court's instruction on the presumption of innocence.

The Court instructed the jury that "the law presumes a defendant to be innocent of a crime. . . ." Petitioner relies on *Taylor* v. *Kentucky*, 436 U. S. 478, 98 S. Ct. 1930 (1978) in support of his argument. This reliance is misplaced. In *Taylor* there was *no* instruction on the presumption of innocence. The Supreme Court, in the holding that an instruction on the presumption of innocence is a due process safeguard, wrote:

> This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. See e. g. *Estelle* v. *Williams*, 425 U. S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). And it long has been recognized that an instruction on the presumption is one way of impressing upon the jury the importance of that right. (Citations omitted.) While use of the particular phrase 'presumption of innocence'—or any other form of words—may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.' *Estelle* v. *Williams, supra*, 425 U. S., at 503, 96 S. Ct., at 1693. The 'purging' effect of an instruction on the presumption of innocence, *Thaxton*, *supra* [483 F. 2d 1071, 1073 (C. A. 5 1973)], 483 F. 2d, at 1073, simply represents one means of protecting the accused's constitutional right to be judged solely on the

basis of proof adduced at trial." 436 U. S. at 435, 98 S. Ct. at 1934.

Subsequent to *Taylor* the Supreme Court in *Kentucky* v. *Whorton*, ____ U. S. ____, 99 S. Ct. 2088 (1979), held that the failure to give the presumption of innocence instruction does not in and of itself violate the Constitution. If the failure to give a presumption of innocence instruction is not per se a constitutional violation, we are at a loss to perceive how constitutional error can be present where the trial court in fact gave an instruction on presumption of innocence which comported with state law. Ky.R.Cr.P. 9.56.[2]

We determine that petitioner's fifth argument is devoid of merit.

VI.

Petitioner next attacks the failure of the trial court to give his tendered instruction describing the burden of proof.

The instructions of the trial court of which petitioner complains read as follows:

"1) MURDER as to Cathryn L. Stallings:

You will find the Defendant guilty, under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Daviess County on or about August 12, 1975, he killed Catheryn L. Stallings by shooting her with a pistol;

AND

(b) That in so doing he caused Cathryn L. Stallings' death intentionally and not while acting under the in-

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[2]An identical instruction was recently approved by the Sixth Circuit in *Smith* v. *Sowders*, No. 81-5093, decided March 24, 1981.

fluence of extreme emotional disturbance for which there was a reasonable explanation or excuse under the circumstances as he believed them to be."

The elements of the crime of murder are set forth in KRS 507.020(1):

"A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person."

Petitioner relies on *In re Winship,* 397 U. S. 358, 90 S. Ct. 1068 (1970), in which the Court articulated the following:

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged." 397 U. S. at 364, 90 S. Ct. at 1073.

We of course accept this basic concept. We disagree, however, with petitioner's application of it to the instructions of the trial court. The instructions clearly told the jury that petitioner could be found guilty only if the jury found beyond a reasonable doubt every element of the crime charged.

As was said in *Milton* v. *Wainwright,* 407 U. S. 371, 92 S. Ct. 2174 (1972): "The writ of habeas corpus has limited scope; the federal courts do not sit to retry state cases de novo but rather to review for violation of federal constitutional standards." 407 U. S. at 377, 92 S. Ct. at 2178. We find no violation of constitutional standards in the court's instructions.

VII.

Petitioner further attacks the court's instructions as deficient in that they did not parrot the language of KRS 507.020.

We start with the fundamental proposition that jury instructions correct as a matter of state law are not reviewable in a habeas corpus proceeding, *Pilon* v. *Bordenkircher,* 593 F. 2d 264 (6th Cir. 1979), unless the instructions rise to the level of constitutional error. The Supreme Court of Kentucky has held that the trial court's instructions were correct as a matter of state law and we are unable to perceive any constitutional error in the instructions.

VIII.

Finally, petitioner contends that the trial court erred in instructing the jury under the wanton murder section of the statute. KRS 507.020(1)(b). Petitioner contends that this is a fatal variance and thus error.

"A variance occurs when the proof introduced at trial differs *materially* from the facts alleged in the indictment." (Emphasis added). *United States* v. *Beeler*, 587 F. 2d 340 (6th Cir. 1978).

Only if the variance creates a substantial likelihood that a defendant may have been convicted of a crime other than that charged by the indictment is the variance fatal. *United States* v. *Beeler, supra.*

We conclude that there was no material variance in the crime charged and the proof at trial. As is pointed out in Section 8.02(c), Brickey, *Kentucky Criminal Law* (1974);

> "The Penal Code abolishes felony murder as a separate and distinct theory of liability, and treats such homicides as murder only if committed intentionally or wantonly under circumstances manifesting extreme indifference to human life. This does not preclude a murder conviction for an unintentional homicide occurring during the commission of a felony, ..."

In summary, we hold that if there were a variance it was harmless error in light of petitioner's denial of his participation in the events from which his conviction arose.

CONCLUSION

For the reasons set forth in this Memorandum, the petition for writ of habeas corpus will be dismissed and an appropriate order has been entered this date.
June 24, 1981

(s) Thomas A. Ballantine, Jr.
United States District Judge

Opposition

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No. 81-2002

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES C. STALLINGS - - - - Petitioner

versus

LLOYD FLETCHER and
STEVEN L. BESHEAR - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Petitioner Was Denied Due Process of Law When the Trial Court Ordered Him to Testify Before His Last Defense Witness?

II.

Whether Petitioner Was Denied Due Process of Law When the Trial Court Admitted Evidence That Was Seized Without a Warrant by Police and Fire Authorities at the Petitioner's Home on the Day of the Fire?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-2002

JAMES C. STALLINGS - - - - *Petitioner*

v.

LLOYD FLETCHER and
STEVEN L. BESHEAR - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The respondents, Lloyd Fletcher and Steven L. Beshear, pray that the petition for writ of certiorari to review the Order of the United States Court of Appeals for the Sixth Circuit rendered February 17, 1982, be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was rendered on February 17, 1982 (Petition's Appendix, hereinafter PA 27-30). The Memorandum Opinion Per Curiam of the Ken-

tucky Supreme Court was rendered on January 15, 1980 (PA 32-34). The Order and Memorandum of the United States District Court was rendered on June 24, 1981 (PA 35-47).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

I.

Whether the Petitioner Was Denied Due Process of Law When the Trial Court Ordered Him to Testify Before His Last Defense Witness?

II.

Whether Petitioner Was Denied Due Process of Law When the Trial Court Admitted Evidence That Was Seized Without a Warrant by Police and Fire Authorities at the Petitioner's Home on the Day of the Fire?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The respondents accept the petitioner's statement of the case as substantially correct. Any disputed facts germane to the issues raised in his petition will be

referred to where applicable in the arguments of respondents' response as hereinafter set forth. The respondents' method of citation to the trial record and evidence will be to the Joint Appendix filed by the parties in the Sixth Circuit hereinafter cited as "JA."

REASONS FOR DENYING THE WRIT

This Honorable Court should deny the petitioner's petition for writ of certiorari since the Sixth Circuit correctly found that this Court's holding in *Brooks* v. *Tennessee* was not violated when the petitioner was required to testify before his last defense witness. Further, the Sixth Circuit's Opinion correctly found that the evidence was properly admitted at trial and thus did not violate the Fourth and Fourteenth Amendments as interpreted by this Court in *Michigan* v. *Tyler* and *Mincey* v. *Arizona*.

ARGUMENT

I.

The Trial Court Did Not Deny the Petitioner Due Process of Law by Compelling Him to Testify Before His Final Witness.

In order to accommodate the petitioner, the trial court allowed his last witness to testify on the last day of the trial because the witness was not available at the time trial counsel wanted to introduce his testimony. Stallings then took the stand on the evening before the last witness testified. It was clearly not

error for the trial court to conduct an evening court session in order to bring the long trial to an end. *Anderson* v. *Commonwealth,* Ky., 353 S. W. 2d 381 (1961). Further, the trial court was not under obligation to allow the petitioner to delay the trial by testifying after his last witness.

In the instant case, all of the witnesses for the defense had testified before Stallings, save a chemist who was permitted to appear on Stallings' behalf on Friday morning as he could not be present on Thursday (Joint Appendix, hereinafter JA 219, 261). Thereafter, Stallings testified in his own defense, was cross-examined, and the court recessed. The last defense witness then testified the next morning. (JA 276).

The petitioner's reliance upon *Brooks* v. *Tennessee,* 406 U. S. 603 (1972) is clearly misplaced. In that case, a Tennessee statute requiring that a defendant testify prior to other defense witnesses or waive that right was held unconstitutional. In the case at bar, Stallings was not required to testify before other defense witnesses. To the contrary, the record discloses that Stallings testified after all other defense witnesses except the chemist who appeared on Friday. That he was required to testify before that particular witness was the result of Stallings' own failure to have the witness present on Thursday.

The record does not reflect that Stallings was prejudiced or impaired in the presentation of his defense by being compelled to testify before his last defense witness.

In addition, assuming it was error for the trial judge to compel Stallings to testify before his last defense witness (and clearly it was not error), this is nothing more than an alleged state trial error for which Stallings sought review in the District Court and the Sixth Circuit, and is now seeking review in this Court. As this Court is aware, state trial or procedural errors are not reviewable on a petition for a writ of habeas corpus absent extreme circumstances which do not exist here. *Combs* v. *State of Tennessee,* 530 F. 2d 695 (6th Cir. 1976); *Gillihan* v. *Rodriquez,* 551 F. 2d 1182 (10th Cir. 1977). Thus, the respondents respectfully submit that this particular issue presents no federal question and, therefore, cannot be a basis upon which to grant federal habeas corpus relief. The petitioner's petition for writ of certiorari should be denied.

II.

The Trial Court Properly Admitted the Evidence Gathered by Police and Fire Authorities at the Petitioner's Home on the Day of the Fire.

The respondents would first point out that a petitioner may not be granted federal habeas corpus relief on the grounds that evidence was obtained in an unconstitutional search or seizure violative of the Fourth Amendment, where the state court provided an opportunity for a hearing on the subject. *Stone* v. *Powell,* 428 U. S. 465 (1976).

In the case at bar, Stallings made a motion to suppress the admission of the allegedly illegally obtained evidence. (JA 64-65). Although a full-blown suppression hearing was not held, the respondents submit that Stallings was given a full and fair hearing on the matter at the pre-trial hearing. (JA 11-21). As can be seen from the joint appendix, fifteen pages of the pre-trial hearing were devoted to discussion of Stallings' motion to suppress this evidence. Stallings' motion to suppress was denied by the trial court at the pre-trial hearing. (JA 20). Since Stallings in this case received a fair litigation of his claim in the state court proceedings, he would not be eligible for federal habeas corpus relief on that ground in this case. See also: *Moore* v. *Cowan,* 560 F. 2d 1298, 1302 (6th Cir. 1977).

Even if this Court finds that Stallings was not given an opportunity to litigate this claim, the trial court did not commit error by refusing to suppress the evidence.

At the pre-trial conducted on November 17, 1978, Stalling moved to suppress all evidence seized by fire and police authorities at his home on the day of the fire. Stallings contended in his motion that the search of his residence was illegal as no warrant was obtained after the fire had been extinguished. (JA 64-65).

The items challenged as fruits of the allegedly illegal search consisted of (1) three guns removed from Stallings' bedroom, (2) the bedroom closet doors containing bullet holes, (3) spent bullets found inside the bedroom closet, (4) photographs of the bedroom and

(5) pieces of carpeting and wood removed from the staircase of Stallings' home, where the fire was believed to have begun. All of this evidence was subsequently introduced by the prosecution at trial, together with a chemical analysis of the carpet and wood samples showing the fire had been set with an accelerant and testimony regarding the angle of the bullet holes found in the closet doors, which tended to disprove Stallings' version of the incident.

At the pre-trial hearing, the prosecution noted that all the evidence of which Stallings complains was gathered while the fire was still "hot," and that firemen were on the scene continuously during the process. (JA 11). That firemen were in fact at the Stallings' home during the gathering of this evidence was conceded by trial counsel. (JA 12-13). The Commonwealth added further that all of the evidence challenged at the hearing was obtained prior to noon on the day of the fire. (JA 14-15). It is also notable the crime was being investigated on the report of Stallings himself—that an intruder killed his wife and started the fire which resulted in the death of his children. (JA 48-49).

Those cases relied upon by Stallings, *Michigan* v. *Tyler,* 436 U. S. 499 (1978), and *Mincey* v. *Arizona,* 437 U. S. 385 (1978), do not dictate that habeas corpus relief should have been granted in the case at bar. The respondents submit that the contrary is shown by these cases. (JA 49-50).

Although it was disputed whether there was evidence seized after noon on the day of the fire, the

Sixth Circuit felt compelled to accept the petitioner's contention that critical evidence was seized some six to twelve hours after the fire was extinguished (PA 28-29). Nonetheless, the Sixth Circuit went on to hold that both the police and arson squad search were justifiably initiated without a search warrant and did not extend for an unreasonable time under *Michigan* v. *Tyler, supra.* Respondents agree.

In *Michigan* v. *Tyler,* a midnight fire broke out at a furniture store in Oakland County, Michigan. The local fire department responded immediately and were extinguishing only smoldering embers by the time the fire chief arrived about 2:00 a.m. It was his responsibility to determine the cause of the fire, and he began his investigation with a police detective around 3:30 a.m. Pictures were taken, but due to darkness and heavy smoke, his efforts were abandoned for the time. The fire was completely extinguished by 4:00 a.m. and all firemen departed. No search warrant was obtained or consent given by the owner of the store to investigate the fire at the time of the blaze, or when the fire chief and the police resumed their investigation later that morning. At that time, they took samples of carpeting, sections of a stairway, and searched through the rubble to look for any other signs of evidence.

The United States Supreme Court found that the fire chief's re-entry of the building later that morning was no more than a continuation of his initial investigation, and that the lack of a warrant did not invalidate the resulting seizure of evidence. In refut-

ing the Michigan Supreme Court's opinion that a warrantless entry to fight a fire ends with the dousing of the last flame, the Court stated:

> "We think this view of the firefighting function is unrealistically narrow. . . . Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its reoccurrence, as through the detection of continuing dangers such as faulty wiring or defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. . . . For those reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional." (436 U. S. at 510).

The Supreme Court affirmed the Michigan Supreme Court's reversal of Tyler's conviction because investigators made a warrantless visit to the scene of the fire *four, seven, and twenty-five days after the occurrence of the blaze to obtain further evidence.* These searches were not made within a "reasonable time" after the fire. Still, the morning re-entries were deemed to be constitutionally permissible.

In the instant case, the firefighters were on the scene of the fire continuously, and for no longer a

period of time than was permitted in *Michigan* v. *Tyler, supra.* As the Sixth Circuit found, none of the evidence gathered at the fire scene was obtained later than six to twelve hours after the fire was extinguished. (PA 29). The evidence specifically gathered by the state arson investigator, the samples of carpeting and wood, was clearly competent and was properly admitted.

Although the Sixth Circuit held otherwise in the case at bar, the decision in *Mincey* v. *Arizona, supra,* presents a similar situation involving a search at the scene of a homicide. In *Mincey,* the United States Supreme Court reversed the defendant's conviction where the warrantless search of his apartment lasted for four days. The Court observed:

> "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. (Citation omitted.) The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. (Citations omitted.) And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. (Citations omitted.)"

Even were Stallings' contention that the police officers exceeded their authority under the *Mincey* standard in the search which was conducted in the instant case, it must be remembered that the facts which exist here were different than in *Mincey*. This was not a fire or a homicide. It was both. Three children were burned to death as a result of arson. Stallings' wife was intentionally shot to death. The police had a clear right to be on the scene.

Several of the challenged items of evidence were in plain view of the police officers, who had a right under *Michigan* v. *Tyler, supra,* and *Mincey* v. *Arizona, supra,* to search the premises. For example, the bullet holes in the closet doors of Stallings' bedroom were clearly evident upon entry to that room. (JA 141). These doors were properly seized as evidence. Upon their removal, the spent bullets found on the closet floor and the .357 magnum pistol were in plain view. (JA 154). The Model 60 pistol was found on the floor beside Stallings' bed and would have been in plain view of anyone entering the bedroom had the fire not caused insulation from the ceiling to cover. (JA 145). That the police had to move the insulation should not defeat the plain view doctrine under such circumstances. Certainly, the taking of pictures of the bedroom was not improper. The respondents can only agree that the discovery of the .25 automatic pistol in a dresser drawer was improper if the drawer was closed, which is not indicated by the record.

In *Coolidge* v. *New Hampshire,* 403 U. S. 443, 465-466 (1971), it was stated:

> "Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. . . . Finally, the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. Harris v. United States, 390 U. S. 234, 88 S. Ct. 922, 19 L. Ed. 2d 1067; Frazier v. Cupp, 394 U. S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684; Ker v. California, 374 U. S. at 43, 87 S. Ct. at 1635, Cf. Lewis v. United States, 385 U. S. 206, 87 S. Ct. 424, 17 L. Ed. 2d 312.
>
> What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused."

Harris v. *United States,* 390 U. S. 234, 236 (1968) specifically notes:

> "It has long been settled that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

Clearly, evidence of arson, such as gasoline fumes, the intensity of a fire, and the occurrence of four homicides, coupled with the confusion of such a scene do

not require the seeking of a warrant. "The Fourth Amendment was not intended to handcuff the police in their reasonable efforts to handcuff criminals." *United States* v. *Jackson,* 448 F. 2d 963, 970 (9th Cir. 1971).

It must be finally noted that the most telling evidence against the accused, i.e., the obvious presence of arson as determined from the samples of wood and carpeting taken from the Stallings' residence, and the murder weapon found in Stallings' car trunk upon a consent search, were properly obtained. The guns found in Stallings' bedroom, the spent bullets found in his closet, and the closet doors themselves did not appreciably add to the Commonwealth's evidence against him. If error did exist in the introduction of these exhibits, it must be deemed harmless. The respondents submit again, however, that Stallings has demonstrated no error and fails to raise a significant constitutional question. The petition for writ of certiorari must be denied.

CONCLUSION

WHEREFORE, based on the foregoing, the respondents ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF MAILING FOR FILING

I, K. Gail Leeco, hereby certify that a c y of the brief in opposition to petition was served upon the petitioner by depositing it in a United States mailbox, with first-class postage prepaid, addressed to Hon. C. Thomas Hectus, 800 Marion E. Taylor Building, Louisville, Kentucky 40202, Counsel for Petitioner herein, on this the 4th day of June, 1982. All parties required to be served have been served. Copies have been mailed for filing in this Court, addressed to the Clerk of this Court, on the same date and by the same method.

K. Gail Leeco
Assistant Attorney General